IN THE COUNTY COURT OF VICTORIA

Revised
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Suitable for Publication

AT MELBOURNE
CRIMINAL JURISDICTION

CR-17-01576
CR-17-01577

DIRECTOR OF PUBLIC PROSECUTIONS

v

PHILIP FITZHERBERT
NEIL WRIGHT

JUDGE:	HIS HONOUR JUDGE McINERNEY
WHERE HELD:	Melbourne
DATE OF HEARING:	10 & 11 February 2020
DATE OF SENTENCE:	2 April 2020
CASE MAY BE CITED AS:	DPP v Fitzherbert & Wright
MEDIUM NEUTRAL CITATION:	[2020] VCC 383

REASONS FOR SENTENCE

Subject: CRIMINAL LAW

Catchwords:	CRIMINAL LAW - Pleas of guilty – Obtain financial advantage by deception – Course of Conduct - Sum of $678,617 over 350 transactions – Separate indictments – Imprisonment – Suspended sentence
Legislation Cited:	s.5(2F) *Sentencing Act* - Clause 4A Schedule 1 of the *Criminal Procedure Act* - s.82(1) of the *Crimes Act*,
Cases Cited:	*O'Neill* [2015] VSCA 325 - *R v Verdins* (2007) 16 VR 269

APPEARANCES:	Counsel	Solicitors
For the Director of Public Prosecutions	Mr P. Pickering	Office of Public Prosecutions
For Accused Fitzherbert	Mr D. Gibson	Victoria Legal Aid
For Accused Wright	Mr J. McGarvie (Sentence) Mr C. Morgan (Plea)	Stary Norton Halphen

HIS HONOUR:

1 This plea involving Mr Wright and Mr Fitzherbert took place on 10th and 11th of February of this year. Both prisoners pleaded guilty to a series of connected frauds in their own particular indictments. In each indictment, the charges are course of conduct charges pursuant to clause 4A Schedule 1 of the *Criminal Procedure Act*. As to sentencing in each charge, s.5(2F) *Sentencing Act* applies.

2 Exhibit A was accepted by both counsel as the circumstances upon which I am to sentence their clients. It seems to me appropriate therefore that I read out from that document the following.

3 Paragraph 4, the crux of the scheme was that Mr Wright claimed:

(i) That was the sole beneficiary of a trust valued at $4 billion;

(ii) That Australian authorities were seeking to prevent the money from flowing to him;

(iii) That Australian authorities were taking legal action to prevent him accessing the money;

(iv) That legal proceedings were being held in secret and subject to a suppression order and was in the national interest and therefore no public record; and

(v) That as a result of his legal expenses concerning the release of his funds, his own funds to further contest the legal action were depleted.

4 Paragraph 5, it was in these circumstances that Mr Wright sought contributions to pay for his legal expenses and offered to provide a large return on any amount provided.

5 Paragraph 7, the most common request related to sourcing $3,000 each day to pay a barrister called Chris to appear in Court. The legal action concerning the trust and Chris, the barrister, were fictitious. Mr Wright was not incurring legal expenses and there was no $4 billion for disbursements.

6 Paragraph 6, the request for funds was made either by Wright himself or by a series of intermediaries. In some cases, the complainants dealt only with the intermediaries. In most cases, the intermediaries would forward text messages to their group of investors or supporters which they obtained from Wright who normally signed off as Neil. In some cases, the victims or complainants in this matter dealt directly with Wright in addition to the intermediary. Mr Fitzherbert was ostensibly an intermediary, but the Crown allege that Mr Fitzherbert was complicit with Wright in the fraudulent scheme and they acted together so that one or both of them could obtain funds from the complainants. I will come back to that relationship in due course.

7 Insofar as Indictment C1610876.1 relating to Mr Wright, he has pleaded guilty, to 10 charges of obtain financial advantage by deception. Each of those charges, is a course of conduct charge, it is laid pursuant to s.82(1) of the *Crimes Act*, the seriousness of which is demonstrated by the fact that Parliament has prescribed a maximum penalty of 10 years in regard to each such offence.

8 The first offence concerns the victim Troy Busk. The period of offending is 29 October 2007 to 10 June 2008, a period of eight months. The amount taken from Mr Busk was $74,845 which is detailed by the prosecution in Schedule A. The proposition put to Mr Busk was those moneys were to fund the legal fees to settle a case and ultimately invest those funds in a gold mine.

9 Insofar as that Schedule A is concerned, it demonstrates that that there were 29 such transactions and all of such payments were made directly to Mr

Wright in cash.

10 Charges 2 and 3 on the indictment concern the victim, Bauer. The total of the sum paid in Charge 2 is $100,550. The details of both the Bauer matters are set out in Schedules B and C. In Charge 2 there were 45 transactions, and all were paid in cash to Mr Wright, the offending took place over a period 11 November 2007 to December 2008, a period of one year.

11 The offending in regard to Charge 3 was from 2 October 2010 to April 2013, a period of three years. In this instance, it was alleged that the fees were being used to fight a legal case against the tax office. Insofar as Count 3 is concerned, there were 32 transactions involving a sum of $27,800. Three of those payments were made to Mr Fitzherbert, the balance to Mr Wright by cash.

12 Count 4 involved the victim Soden. The period of offending is four years from February 2008 to November 2012. The alleged purpose here were legal costs for a High Court battle. The sum paid was $27,800, as detailed in Schedule D. There were 32 such transactions. All were made in cash, but for five paid to Mr Fitzherbert, all were paid to Mr Wright.

13 Charge 5 involved the victim, Mr Bowden. This is a charge that relates to Mr Wright only. The period here is from March 2008 to April 2013, a period of five years. The sum that Mr Bowden gave was $8,100. Schedule E tendered in Exhibit A shows 14 transactions, all were paid in cash to Mr Wright. The alleged purpose for which Mr Bowden gave moneys was to allow Mr Wright to access moneys from stocks and bonds so that legal costs could be paid in the High Court.

14 The next victim was Mr Davies. The period of offending in regard to Mr Davies was from November 2008 to July 2010, a period of one year and eight months. Schedule F details 58 transactions whereby Mr Davies gave in total

$134,400 in cash, all to Mr Wright but for eight payments which were made to Mr Fitzherbert. In this instance, the alleged use of the moneys was for costs for a High Court case.

15 We then come to the victim Webb-Mole. There are three charges in regard to Mr Webb-Mole, seven, eight and nine. The first of those was for the period November 2010 to December 2010. All of the payments made by Mr Webb-Mole were made either by way of transfer from a cheque account of an overdraft account. Charge 7 involved 34 transactions. Schedule G details those transactions. The purpose for each of these three payments was for the costs of Court proceedings insofar as a dispute over a gold cache.

16 It is interesting to analyse Schedule D, all of those payments, were made by the method I have indicated, but for five, to Mr Wright. In regard to those 34 transactions, essentially the sums varied from between $220 to $3,000, but they were mainly in sums of $3,000.

17 The second charge insofar as Webb-Mole was concerned was from January 2011 to December 2011. Such involved a sum of $141,000. Schedule H sets out the 117 transactions. Those transactions varied from the payment of between $250 to $10,000 and of those 117 transactions, 38 were paid to Fitzherbert and the balance to Wright.

18 Charge 9 concerning Mr Webb-Mole was for the period January 2012 to September 2012. Schedule I details that the sum paid in this instance by Mr Webb-Mole was $34,300 by way of 22 transactions. All were paid by the method I have indicated into the accounts of Mr Wright, and further analysis of Schedule I shows that those payments varied between $50 and $5,000.

19 Charge 10 relates only to Mr Wright. The victim in this case is Mr Weitemeyer. Schedule J to Exhibit A detailed the totality of payments amounting to $12,450 and the nine transactions that make up this particular

charge. The payments were made from January 2013 to August 2015. The alleged reason proffered was to pay the costs for a court case. As I said, all payments were made in cash to Mr Wright.

20 Coming then to the indictment concerning Mr Fitzherbert, Indictment No.C1610876.2. They are the same charges that relate and have been detailed by me in regard to Mr Wright's indictment, but for the two of which he is not charged and for which Mr Wright was charged, concerning Mr Bowden and Mr Weitemeyer.

21 In trying to follow this torturous path, especially for victims, one adopts the course of following the money. The money in total received was $678,617, involving some 350 transactions. All but the minority of deposits went directly to Wright. All were in cash but for the Webb-Mole payments, who as I have said made payments by way from his cheque or overdraft account.

22 An analysis of the respective banking accounts of Mr Wright and Mr Fitzherbert was made by the Crown. It is illustrative and of assistance to the Court. Insofar as Mr Wright, this analysis is contained at p. 765 of the depositions.

It is an analysis of all the accounts that could be ascertained from the period January 2007 to December 2015. It is noteworthy that in that period, a sum of $2.99m was deposited into the account of Mr Wright. Something like approximately $375,000 per annum.

23 It should immediately be noted, of the victims of which I am here concerned, the payments totalled $413,000 as detailed in those payments. Unidentified cash deposits amounted to $1,183,000.

24 In regard to the debits from those accounts, the more notable were payments for school fees for his four children of $140,000, TattsLotto payments of an astounding sum of $94,000 and cash withdrawals totalling $488,000.

25 What should be noted in regard to all of those accounts, at the time they were checked by investigating authorities, there is not one brass cent left in any of them.

26 As to Mr Fitzherbert, the analysis of his accounts is at p. 766 of the depositions. To no doubt his wife's surprise, his accounts had been credited in the sum of $188,000. In particular, payments from Webb-Mole in the sum of $37,480, Mr Bauer $4,500 and Soden, $800. There had been cash deposits of $16,000 and unidentified cash deposits of $100,000.

27 As to the debits, again no doubt a surprise to his wife, was bank transfers, which one assumes going directly to Wright of $31,000, cash withdrawals of $89,640 and unidentified withdrawals of $50,000.

28 The prosecutor submitted that both parties were involved in these schemes and indeed the pleas have been made on that basis. I will come to the propositions put by counsel in due course. However, it is the view of the prosecution that the major operator by way of culpability was Mr Wright.

29 It appears certainly from my observation, and from what I have been able to ascertain from this myriad of facts, that Mr Fitzherbert was a spruiker and an occasional receiver of money, the majority of which he would forward to Mr Wright. Clearly, the proposition that his degree of culpability is lower than Mr Wright is evident from the facts.

30 Mr Wright of course had other spruikers, which is obvious from his bank details and also appears to have been involved in a much larger enterprise than I am dealing with here today. I stress that Mr Wright will be and is entitled to be sentenced only in regard to these charges and I will sentence him accordingly. The fact that there are substantial moneys in excess of the moneys that I am dealing with that have been lodged by way of cash into his accounts is simply a fact to be observed along the way.

31 However, when Mr Morgan came before the Court on behalf of Mr Wright, on a plea of such serious offending and says that he has limited instructions, this Court has within appropriate boundaries to look either to the depositions, the victim impact statements or the material relied upon by the prosecution to try to ascertain the breadth of this operation.

32 As I have said, the prosecution's summary and the schedules that I have detailed to the indictment are of assistance, as is the analysis of the deposits that I have referred to, as is the statement of Troy Busk contained at deposition 112.

33 The victim impact statements are also of assistance to try to understand the scheme inculcated by Mr Wright and participated in actively by Mr Fitzherbert.

They show, in addition to Mr Wright, a number of intermediaries, a Mr Radnich, Mr Gary Bisk as well as Mr Fitzherbert. All of those intermediaries appear to be spruiking Mr Wright, his assets, his need to obtain those assets and the use of the law to do so.

34 Clearly the offers made to victims were astronomical by way of returns. Insofar as Mr Bauer is concerned, I take it from paragraph 16 of the opening, he was advised by Mr Bisk that for the payment of $4,000, he would be receiving $400,000.

35 At paragraph 39 which refers to the sworn statutory declaration ultimately made by Mr Fitzherbert contains the alleged return, astounding as it sounds for

Mr Davies, from the investment of $134,000, a return of $275m.

36 For the qualified accountant, Webb-Mole, Mr Wright had indicated to him that for the investment of $270,624, his return would be $5m. Such offers are of course unreal. They are of course motivated, and I say this guardedly

because one never understands why people are so easily parted with their money, but they must have been motivated if not by gross stupidity, by a degree of greed.

37 Also what is amazing is that despite the total failure of any return to any of these investors at any time over the many years, the victims continued to make contributions. Of course, as demonstrated by the text messages to and from Mr Wright, which have been tendered today, in the Webb-Mole matter, the victims found themselves by way of their trust in the intermediaries and Mr Wright, so far down the track and in such financial distress that the only hope many of them had were that these proffered returns would be made. Clearly a very forlorn hope.

38 Of course, the victims now describe themselves similarly to the terms that I have referred to. They make sad reading. If you read Exhibit B, the victim impact statement of Davies, he talks of a loss of trust in persons as a result of what he went through. Exhibit C, Mr Webb-Mole uses in regard to himself a reference to his stupidity and misplaced trust. Exhibit E, Mr Bowden refers to stupidity and foolishness. Exhibit F, Mr Bauer stupidity in losing so much money, I cannot forgive myself, I used my mother and my brother's funds which I directly paid to Wright which also were lost.

39 It was submitted in the plea, by Mr Morgan, that this criminality was not a breach of trust by Mr Wright. I accept in the sense of we traditionally deal with breach of trust in this Court being a fiduciary or professional relationship. It is not a breach of trust in that sense. However, in this case, in my view, it was a breach of trust developed through friendship and such trust was continually breached. Such trust was based upon a trust in Mr Wright and or his spruikers, who had so successfully promoted this scheme on Mr Wright's behalf.

40 I can only describe the criminality as ongoing and cynical.

41 It was further put by Mr Morgan that his client, Mr Wright, got nothing. It was a system whereby the intermediaries had a strong role and his direct control was limited. As I said to Mr Morgan at the time, I reject such strongly. A perusal of in particular Exhibit H, the messages, from pp.261-683 demonstrate in stark reality in the period with Mr Webb-Mole from November 2011 to December 2012, the direct role played by Mr Wright. Clearly, one can observe and see Mr Wright promising funds to be cleared as late as 20 December 2012, even after Mr Webb-Mole's business had been placed in administration and where he had endured threats from the tax office to put him into receivership personally for unpaid tax. Such circumstances ultimately leading to bankruptcy of Mr Webb-Mole in 2013 and the sale of his home. All those circumstances happening when there was not one skerrick of a return, despite the numerous proffered statements by Mr Wright that a return was coming.

42 Given such a heartless degree of criminality, it is surprising that Mr Wright's priors are so limited. Perhaps again, a demonstration of his 'skills,' if I can describe them as that. His priors were admitted at the plea and tendered as Exhibit G whereby the explanation of such priors was given, all relate to charges of deception. That they are limited, but of particular relevance. He is clearly not to be sentenced again in regard to those matters.

43 However, they are again dishonest conduct and totally consistent with his current behaviour. As I say, they are aged, but they are relevant because of their like nature.

44 That description, as I have said, clearly demonstrates a person who was able to behave in the heartless manner as I have described.

45 In the December 2002 hearing, Mr Wright received a suspended sentence of

four months. Having perused myself the circumstances of that offending, one can only say he was very lucky. In the 2004 hearing, he only received a fine of $3,500.

46 Objectively therefore in regard to Mr Wright, I assess his criminality as high on the scale of heinousness.

47 Coming to Mr Fitzherbert in such assessment, clearly as I have said, his was the lesser role. However, whatever he thought at the beginning of the relationship with Mr Wright, it is accepted by his counsel that throughout the period of these charges, he was aware of Mr Wright's methodology and the criminality of Mr Wright's schemes.

48 The proposition put by Mr Fitzherbert's counsel, Mr Gibson, was that insofar as the charges are concerned, in regard to the first four charges, there was no direct role played by him. Insofar as those victims are concerned, it is to be noted that there was the receipt of moneys from both Soden and Bauer. However, as was put on the plea, he pleads guilty to those first four because of his general support role to Mr Wright.

49 As I say, by the time of this offending, it is accepted that Mr Fitzherbert was fully aware of the criminal scheme. Given such knowledge, he still spruiked and collected for Mr Wright. The payments are identified in analysis of his account in regard to Soden, Bauer, Webb-Mole and Davies. He also personally benefitted, unlike the other spruikers, to an unknown degree. As I have already said, certainly this was to the amazement of his wife, Christine, according to her evidence.

50 I accept the Crown's submission as to Mr Fitzherbert that he got a fraction of the proceeds, that his was a much lesser role, albeit his much more active role in Charges 5 to 8 to which he has pleaded, his returns were not huge when they are itemised. I assess his criminality objectively as mid to high.

51 Coming then to the plea of Mr Wright conducted by Mr Morgan. Mr Morgan accepted that given the criminality, gaol was the appropriate sentence. He stressed that his client was now 69. That he apparently had degrees in his past in accounting and mathematics and a background in the financial sector.

52 In 1981, Mr Wright was employed as an investment banker, specialising apparently in modelling. Mr Morgan was, as I have indicated, given limited instructions on the plea. It was put that Mr Wright never met a number of the persons who invested in his schemes. That proposition was not contradicted by the prosecution and seems to me remarkable if correct.

53 As I indicated in the discussion with Mr Morgan in the last hearing, common sense dictates, and even more so since I have more closely looked at all of the material that I have referred to, that Mr Wright was the Svengali of these deceptions. He was up to his neck in criminality and was the person who supplied all the relevant material to the intermediaries, who spruiked the schemes on his behalf. As I say, his role is amply demonstrated by the texts, Exhibit H, concerning Mr Webb-Mole.

54 Also, they are demonstrated by his plea. As indicated by counsel, he accepts the prosecution summary, and as I have said, by the analysis of the accounts that I have made. As I stressed in each case, this is a course of conduct charge.

55 I accept Mr Morgan's proposition that the plea of guilty was utilitarian. Had this matter proceeded, it no doubt would have been a difficult, long and complicated trial. It saved the victims further trauma. It assists the Court and the attainment of justice. His attitude by way of his instructions to counsel, has not assisted the Court, but he is certainly entitled to a discount because of the plea.

56 I should say, given the circumstances, such plea ultimately would have had to

be made. Had it not been made, there would have been a very difficult trial and difficult process for the victims in this matter who have already been, tortured. It must be seen as a valuable plea and I apply the appropriate discount.

57 Mr Wright was arrested on 4 February 2015. A significant time has passed, albeit the complications and difficulties when these large commercial frauds are effected and investigated, I do take that delay into account on his behalf.

58 I should compliment the investigators. It is not until one is able to see the details set out in the schedules, prosecution opening and read from the various victims statements that one understands the impact of the crimes.

59 Insofar as Mr Wright's age and medical condition, there is nothing that I was able to note from the submissions that indicates any particular factor that would impact upon him while being in gaol. I do of course, given the development of the current circumstances take into account in such sentence that any person placed in gaol, albeit at the moment not that the virus has been discovered, would undergo stress and concern. That is why we have arranged for Mr Wright to hear this sentence by way of video.

60 There is also of course, as part of that concern, a potential for lockdown and isolation. Again that was one of the reasons why Mr Wright appears by way of video, to save him from what would have otherwise been a lockdown on return to the prison.

61 There was no dispute that, especially with the priors of Mr Wright, the sentencing principles of specific deterrence, denunciation and general deterrence are very important. As I indicated to Mr Morgan, there was no appropriate sentence other than a period of imprisonment, that a community corrections order was not appropriate, nor was a suspended sentence, which was, given the timing, still available.

62 Mr Wright, you will be sentenced as follows. Insofar as Charge 1 is concerned, that is the Busk charge, a period of imprisonment of two years. In regard to Charge 2, the Bauer charge, a period of imprisonment of two years. In regard to the second Bauer charge, a period of imprisonment of six months.

That is Charge 3. In regard to Charge 4, the Soden charge, a period of imprisonment of six months. In regard to Charge 5, the Bowden charge, a period of imprisonment of six months. In regard to Charge 6, the Davies charge, a period of imprisonment of two and a half years. In regard to Mr Webb-Mole, Charge 7, a period of imprisonment of two years. In regard to Charge 8, in regard to Webb-Mole, a period of imprisonment of two and a half years.

In regard to Charge 9, in regard to Webb-Mole, a period of imprisonment of six months. In regard to Charge 10, the charge related to Mr Weitemeyer, a period of imprisonment of six months.

63 Using Charge 8 as the base sentence, that is the period of two and a half years, I order that three months of the sentences on Charges 1, 6, 2 and 7 and one month of the sentences on Charges ,3,4,5 9 and 10 be served cumulatively with each other and with the sentence imposed on Charge 8. The end result is an aggregate sentence of three years and 11 months, for which I set a non-parole period of two and a half years.

64 I declare pursuant to s.18, that the 51 days which Mr Wright has served since being remanded by me at the plea, be deemed as service of this sentence and a declaration to that effect be recorded in the records of this Court.

65 Pursuant to the provisions of s.6AAA, I declare that had Mr Wright not pleaded guilty, the sentence, Mr Wright, that I would have sentenced you to is not a sentence of three years and 11 months as the head sentence, but the

head sentence would have been five years and the minimum period before parole eligibility would have been not two and a half years, but three and a half years.

66 Mr Wright, I make an order under 464ZF that you must provide a forensic sample when requested in prison. It is necessary for me to tell you that should you refuse to provide such same, the authorities can come back to this court and seek an order in that regard. I will sign that document today. You will be provided with that in due course, as I understand that is going to be posted to Mr Wright, is that correct? Posted or directed or delivered to the prison.

67 I think they are the matters. So perhaps, Mr McGarvie, if I just go over that again for you or are you all right?

68 MR McGARVIE: I am all right, Your Honour.

69 HIS HONOUR: So base sentence two and a half years, Charge 8. Three months on each of Charges 1, 6, 2 and 7, which makes another total of a year. One month on Charges 3, 4, 5, 9 and 10, which makes another total of five months. Making a period of three years and 11 months as an aggregate sentence for which I imposed a non-parole period of two and a half years. Section 18, 51 days. Section 6AAA, five years with three and a half. A 464ZF order.

70 HIS HONOUR: Coming then to Mr Fitzherbert. Mr Gibson tendered written submissions, Exhibit F2, and in paragraph 1 accepted the sustained and elaborate nature of this criminality. Mr Fitzherbert's role was accepted was one of an intermediary, but one of many. It was accepted that he was very much involved and to a limited degree a beneficiary. The proposition was put, which I accepted in my sentencing remarks for Mr Wright, that clearly Mr Fitzherbert was higher up the chain than the other intermediaries but certainly

nowhere near the culpability of Mr Wright.

71 It was also put that it was a valuable plea and I accept that in the circumstances that relate to Busk, Bauer and Soden. That is that there was no direct contact by way of being an intermediary with those parties except, as I have indicated, the small payments made in regard to Bauer and Soden.

72 Mr Fitzherbert's more direct role was played in regard to Davies and Webb-Mole and for example, approximately 10 per cent of the payments made by Mr Davies had been sent to Mr Fitzherbert.

73 It is of particular note in regard to Mr Davies that the implausible representation as to returns was made by Mr Fitzherbert, by way of a statutory declaration. There was concern, as set out in paragraph 39 of the prosecution statement, from Mr Davies as to security of the money he had invested.

There was then sent to Mr Davies a statutory declaration signed by Mr Fitzherbert quoting a return for the invested funds of some $275,000. Despite that, it is amazing that the payments continued thereafter.

74 As I said, by the analysis of all the material that has been available, the hierarchy of Mr Wright is demonstrated in particular from the messages to Webb-Mole.

75 That hierarchy came by way of reasons for which the moneys were to be obtained, the answering of the concerns, the instructions as to the court cases, the instructions as to the need to pay counsel. All were obtained as is obvious from Mr Wright. However, they were then conveyed on to the hapless victims, in this case by Mr Fitzherbert.

76 As counsel said, his receipt of monies were limited. The identified accounts I have already referred to. It was put by Mr Gibson, it was only some $50,000

over five years, however as shown in the analysis of his accounts, there was a further amount of cash received of some $89,640. I am not precisely sure where that has come from, but given his wife's total shock at his involvement in these crimes, clearly it must have from these schemes.

77 Coming then to the matters put to me as to the mental condition of Mr Fitzherbert, I considered in particular the opinion of the general practitioner, Exhibit F3 Dr Mililli, and the further letter from him being Exhibit F8. Clearly, Mr Fitzherbert has longstanding issues, in particular by way of Bipolar Disorder. He has ongoing psychiatric and physical issues, in particular with his back, knees and hypertension.

78 It is the view expressed that he would be emotionally at risk in gaol and with his depression, there may well be a question of self-harm. Mr Lavoipierre, a psychiatrist provided the Court with a number of reports. In regard to the report of 16 August 2017, Exhibit F4C, the facts as put by way of Mr Fitzherbert's knowledge of what Mr Wright was up to is clearly inconsistent with the basis of the pleas made here.

79 Coming to Exhibit F4B, the bipolar diagnosis is confirmed, and at p.7 of such exhibit, that was a report of Mr Lavoipierre, dated 5 December 2016, the following is said, 'I had no idea at the time he was engaging in financial deals and deception as he is accused of. However, it seemed quite clear at the time that his judgment was impaired. He had dissociative episodes and cognitive impairment, and in a sense, more importantly, lived in a world of make believe. He had, for instance, never served in Vietnam and his sense of being a successful businessman was not a reality and indeed was more an act of self-deception, if not a pure disillusional belief.'

80 It is to be pointed out those issues as to capacity were not pursued, however the bipolar diagnosis was indeed confirmed.

81 Further the consultant psychiatrist, Dr Walton, provided a report to the Court, 7th February 2018, Exhibit F5. Dr Walton being a consultant psychiatrist. His opinion as to the impact upon Mr Fitzherbert of gaol, in particular at p.7 of that report, which is set out in paragraphs 5 and 6 on that page, was: 'It is not that Mr Fitzherbert has an inherent in capacity for appreciating victim empathy although he is suffering from primary mood disorder which will distort emotional expression at times, rather, at this point, he is yet to fully embrace that he is a meaningful offender and he clings to the hope that the investors and victims ultimately would not suffer loss.'

82 Paragraph 6, which is of more import insofar as the sentence to be passed on Mr Fitzherbert says, 'Perhaps because he might be seen as the lesser player in the enterprise, Mr Fitzherbert may not be an immediate risk of custodial disposition. In any event, from my area of expertise, I would assert that his mental illness should be seen as having made at least some contribution to the offending. Perhaps to state the obvious, this elderly man afflicted by a major mental illness will endure incarceration as more onerous as others. It would be unfortunate that his longstanding therapeutic relationship with his treating psychiatrist is interrupted. At least to some extent, I believe it would be argued that Mr Fitzherbert is an inappropriate vehicle for the expression of general deterrence.' Those matters of course are taken into account by myself.

83 The facts and circumstances behind that diagnosis were supported by his wife, who gave impressive evidence.

84 Insofar as it was submitted that principles 1 to 4 of *Verdins* should be accepted, after giving the matter the rigorous assessment required, *O'Neill* [2015] VSCA 325, I do not accept that those principles apply. However, I do accept that principles 5 and 6 are applicable.

85 The background of Mr Fitzherbert by way of business was set out in paragraphs 8 to 11 of Mr Gibson's material. It is noted that he was indeed placed in bankruptcy in the 1990s, and he had to eventually retire from business due to his mental condition.

86 The matters put on the last page of Mr Gibson's submission relate firstly to the fact that Mr Fitzherbert has no prior convictions. He was found guilty, many years ago in 2000, of obtaining financial advantage by deception, the matter was adjourned. I do not know the circumstances, but I do not take that into account given its age.

87 I accept that the plea was valuable. That it was utilitarian because of the complicated nature of the totality of this scheme. The length of a trial that otherwise would have befallen the poor victims. However, as I said in regard to Mr Wright, the reality I think was that, this could never have been a trial. Had it been a trial, it would have been a very difficult process for the justice system and for the victims, and I accept that the plea is utilitarian and assists justice.

88 I accept the proposition put by Mr Gibson as to the age of his client and his ill health. I accept also the impact of the delay upon him.

89 Mr Gibson sought a non-custodial order. As I said, a community corrections order was inappropriate. In the circumstances, the only non-custodial order available was a suspended sentence.

90 Though it seems to me not deserving upon the normal basis one grants a suspended sentence, the circumstances of Mr Fitzherbert's condition, both physical and mental means that it would, despite it being appropriate for him to be sentenced to immediate gaol, be inhumane for this Court to make such an order, especially given the additional risks that have been placed on our community at the moment.

91 On Charge 1 on your indictment, you will convicted and sentenced to a period of imprisonment of two months. On Charge 2, a period of imprisonment of two months. On Charge 3, a period of imprisonment of two months. On Charge 4, a period of imprisonment of two months. On Charge 5, the Davies matter, you will be sentenced to a period of imprisonment of 18 months. On Charge 6, that is the Webb-Mole matter, a period of imprisonment of 12 months.

On Charge 7, a period of imprisonment of 18 months. On Charge 8, a period of imprisonment of two months.

92 Using as the base sentence, the sentence of 18 months in regard to Charge 5, I order that two months of the sentences on Charges 6 and 7 be served cumulatively upon the sentence imposed on Charge 5. Making an aggregate sentence of imprisonment to which Mr Fitzherbert is sentenced of 22 months.

93 As I say, in particular circumstances of Mr Fitzherbert's age, condition, both physical and mental, I have determined that the only order I can make, is an order suspending this sentence for a period of three years.

94 Mr Fitzherbert, the obligation during that time is that you be of good behaviour. If you are not and you record a conviction, you can be brought back for sentencing in regard to these offences.

95 In regard to the circumstances where I am required by Parliament to determine the value of the plea of guilty. The plea of guilty was not the major factor that kept him out of gaol, it is his physical and mental condition. Doing the best I can to comply with the requirements of Parliament, I simply say that had you not pleaded guilty, you would not have got a suspended sentence.

96 You will also be required to undertake a forensic sample order. I will give you that notice now. You will probably be approached by police. It is necessary for me to tell you that you are required to give that sample. If you do not, an

order can be sought from this court.

97 Mr Gibson, are there any other matters that I need to attend to?

98 MR GIBSON: No, Your Honour.

99 MR PICKERING: No, Your Honour.

100 HIS HONOUR: I will just formally give the s464ZF notice. Mr Gibson, I will hand that down to you.

101 Yes, can I thank counsel for their assistance in the matter. You are free to come out of the dock, Mr Fitzherbert.

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